NO. 42658-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MARK GREGORY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 10-1-00601-8

BRIEF OF RESPONDENT

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SERVICE

Michelle Bacon-Adams 904 Dwight St. Port Orchard, WA 98366	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED July 23, 2012, Port Orchard, WA **Original electronically filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.**

TABLE OF CONTENTS

TABLE OF AUTHORITIES
CASES

STATUTES

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Defendant's claim of ineffective assistance of counsel must fail when he cannot show: (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) that an objection to the evidence would likely have been sustained; or, (3) that the result of the trial would have been different had the evidence not been admitted?

2. Whether the Defendant's claim of insufficient evidence must fail when, viewing the evidence in a light most favorable to the State, a rational trier of fact could have found that the State proved the essential elements of the charged offenses beyond a reasonable doubt?

3. The State concedes that the Judgment and Sentence should be amended to clarify that the trial court did not impose a sentence under RCW 9.94A.507.

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Mark Gregory was charged by an amended information filed in Kitsap County Superior Court with rape in the third degree, unlawful imprisonment, and assault in the fourth degree (with sexual motivation). CP 67. A jury found the Defendant guilty of rape in the third degree and assault in the fourth

degree.[1] CP 139. The jury also found that the Defendant committed the crime of assault in the fourth degree with sexual motivation. CP 140. The trial court then imposed a standard range sentence. CP 146. This appeal followed.

B. FACTS

On June 12, 2012, the victim, A.B.R.[2], went to a bar with her husband. RP 242. A.B.R. and her husband were going through a separation at the time and were discussing getting a divorce. RP 231.

At the bar, A.B.R. danced with a bouncer a number of times and then later danced with a shipyard employee. RP 244-45. A.B.R. later stopped dancing with the second man when he began "talking sexual." RP 245. A.B.R. then met a third man at the bar who offered to buy her a drink. RP 246. The bar, however, was closing and was no longer serving drinks. RP 246. The man then told A.B.R. that they could go outside and get a drink, so she went outside with him. RP 246. The man then led A.B.R. to the building next door where they went to the second floor. RP 247. A.B.R. hadn't realized that the building was a motel, but once the man opened a door she realized that it was the door of a motel room (and not a bar, as she had

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[1] The jury found the Defendant not guilty on the unlawful imprisonment count. CP 139.

[2] A.B.R. is Filipino and has only been in the country a few years. RP 47. A.B.R. sometimes uses "broken English" and her syntax and sentence structure is somewhat typical of what one would expect from someone for whom English is a relatively new second language. RP 120-21.

expected) and so she ran back downstairs and back to the bar next door. RP 247. A.B.R.'s then found that her husband had already left for home. RP 233.

A.B.R. asked a bouncer at the bar to call her a cab. RP 248. A cab happened to be waiting at the front of the bar, and the bouncer asked the cab driver (who was later identified as the Defendant) to take A.B.R. home. RP 248-49.

The cab was a "van" type of taxi cab, and one of the men opened the front door of the cab and A.B.R. got into the front seat of the cab. RP 249, 256. When A.B.R. got in the Defendant began asking her why she was by herself and whether she was with anyone. RP 251. A.B.R. replied that she was with her husband but that he had left her at the bar. RP 251. A.B.R. testified that she had consumed five or six drinks, and the Defendant later acknowledged that the victim seemed "tipsy" when he picked her up from the bar. RP 206-07, 244 .

On the way home the Defendant pulled the cab over and parked next to some bushes near a Safeway store. RP 252. It was dark outside and A.B.R. did not see any people or cars nearby. RP 253. A.B.R. asked the Defendant, "What are we doing here?" RP 253, 277. The Defendant responded that they were "just taking a break" and he then started touching

A.B.R.'s leg. RP 253. The Defendant then took A.B.R.'s hand and put it on his pants on top of his penis. RP 253-55. A.B.R. tried to pull her hand away, but the Defendant kept holding her hand. RP 279. A.B.R. did not say anything at this point, as she was "nervous and scared" and didn't know where she was. RP 254-55. A.B.R. is very petite and approximately five-foot-three or five-foot-four, while the Defendant is considerably larger and weighs approximately 300 pounds. RP 197.

The Defendant then opened his door and walked around the front of the cab to the passenger's side, opened the passenger side door, and grabbed A.B.R.'s arm. RP 256-57. A.B.R. asked him what they were "doing here," but the Defendant didn't say anything. RP 257. Instead, the Defendant put A.B.R. in the backseat of the van. RP 256-57. At trial A.B.R. was asked if she screamed or cried out for help at this point, but A.B.R. acknowledged that she did not cry out since she didn't see anyone else around and because she was thinking that the Defendant might do something (or "bad things") to her if she screamed. RP 257-58.

Once A.B.R. (who was wearing a dress) was in the backseat, the Defendant tried to remove her underwear. RP 258. A.B.R. then told him, "What are you doing?" RP 258. The Defendant responded by saying, "It's okay. No problem." RP 258. The Defendant then continued and removed A.B.R.'s underwear. RP 258. A.B.R. testified that at this point she knew

"what's going to happen." RP 258-59. A.B.R. then told the Defendant that she was having her period that day. RP 259. The Defendant didn't say anything and then tried to put his head by A.B.R.'s vagina. RP 259-60. A.B.R. responded by trying to push the Defendant's head away. RP 259-60. She also told him "No. Stop." RP 283. She also told him that, "I told you I have a period this day." RP 260, 282-83. A.B.R. testified that she was successful in pushing the Defendant's head away. RP 260.

The Defendant, however, next took his penis out of his pants. RP 260. The Defendant opened A.B.R.'s legs, removed her tampon, and put his penis inside her vagina. RP 261-62. At this point A.B.R. did not try to push the Defendant away nor did she say anything, and at trial she explained that she did not do anything because, "I'm just so scared that night, and I feel that I'm alone. Just scared." RP 262. A.B.R. further testified that she never told the Defendant that she wanted to have sex with him nor did she ever make any advances to him indicating that she wanted to have sex with him. RP 268.

After having sexual intercourse with A.B.R. for 5-10 minutes the Defendant told A.B.R. that she could go back to her seat in the front. RP 262. The Defendant then got back into the driver's seat and took A.B.R. home. RP 263.

A.B.R. went into her home for a few minutes and then went next door to her in-laws' house. RP 266-67. A.B.R. described that at this point she was "crying" and "angry." RP 267.

A.B.R.'s mother-in-law, Sheila Morgan, woke up when A.B.R. came inside. RP 217-18. Ms. Morgan got out of bed and went in to the front room where she found A.B.R. lying "crawled up in a ball" on the floor. RP 218-19. A.B.R. was "hysterical and crying." RP 218. A.B.R.'s husband arrived at the house shortly thereafter and he also described that A.B.R. was hysterical and screaming. RP 236.

Law enforcement was called, and Deputy Joe Hedstrom of the Kitsap County Sheriff's Office arrived at the home. RP 11, 15. Deputy Hedstrom went inside and saw A.B.R. cuddled up in a blanket crying on the floor. RP 16. Deputy Hedstrom had difficulty getting information from A.B.R., so he asked if A.B.R. would prefer to talk to a female deputy and A.B.R. indicated that she would prefer to talk to a female. RP 17. Deputy Crystal Gray then came to the scene and spoke with A.B.R. RP 17-18, 34-35. A.B.R. then reported the rape and its circumstances to Deputy Gray. RP 37.

Based on the information provided by A.B.R., as well as additional information gathered from local cab companies, the Deputies were able to identify the Defendant as a suspect. RP 63-66. A.B.R. identified the

Defendant from a color photo montage (after having some difficulty identifying a suspect when shown a black and white photo montage) and A.B.R. indicated that the Defendant was the man who had raped her. RP 69-70.

Later that morning Detectives Timothy Keeler and Chad Birkenfeld went to contact the Defendant at his boat in a local marina. RP 151-53. The detectives knocked on a window of the Defendant's boat and the Defendant eventually came outside to speak with them. RP 154-55. The detectives told the Defendant that he was not under arrest, but that they wanted to talk to him about an incident that occurred that night. RP 156. The Defendant indicated that he understood. RP 202. Detective Birkenfeld then asked the Defendant if he had picked up a fare the night before. RP 202. The Defendant said he had picked up a female from a bar and had given her a ride home, but that nothing had happened. RP 156, 202-03. When he was asked how much she had paid for the fare the Defendant said that the female's fare had cost $13 and that she had paid with a ten and three ones. RP 156, 203. Detective Birkenfeld asked the Defendant if anything sexual had happened and the Defendant responded that nothing sexual had occurred. RP 157.

Detective Birkenfeld then told the Defendant that he had spoken to the woman and that she had given a different account. RP 204. He also explained that she had undergone a sexual assault examination and that there

might be forensic evidence from that exam. RP 204. The Defendant then changed his story and admitted that he had sex with the victim. RP 158, 204. Detective Birkenfeld asked the Defendant why he had lied, and the Defendant said he did not know. RP 158.

The Defendant acknowledged that when he picked the victim up at the bar the victim was "tipsy." RP 206-07. The Defendant then explained that the victim had come on to him, so he pulled into an alley at a Safeway store, and he further stated that the victim had reached over and started to play with his penis. RP 158, 204. He also stated that he removed her clothes, the victim removed her tampon, and they then had sex in the back of the van. RP 158, 204-05. The Defendant also claimed that the victim had never said "no," and that she had told him how good he had "fucked" her. RP 159, 206. He also acknowledged that she did not pay for the fare. RP 205.

The Defendant testified at trial and admitted that he had had sex with the victim, but the Defendant claimed the victim had consented. RP 306-24.

III. ARGUMENT

A. THE DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL MUST FAIL BECAUSE HE CANNOT SHOW: (1) AN ABSENCE OF LEGITIMATE STRATEGIC OR TACTICAL REASONS SUPPORTING THE CHALLENGED CONDUCT; (2) THAT AN OBJECTION TO THE EVIDENCE WOULD LIKELY HAVE BEEN SUSTAINED; OR, (3) THAT THE RESULT OF THE TRIAL WOULD HAVE BEEN DIFFERENT HAD THE EVIDENCE NOT BEEN ADMITTED.

The Defendant argues that he received ineffective of counsel at trial. App.'s Br. at 14. Specifically, the Defendant argues that his trial counsel should have objected to the admission of testimony from several witnesses about the victim's out of court statements in the hours following the crime. App.'s Br. at 15. This claim, however, is without merit because counsel's failure to object can be characterized as a legitimate trial strategy or tactic (which cannot serve as the basis for a claim of ineffective assistance). In addition, the Defendant cannot show that an objection to the testimony at issue would have been sustained. Thus, the Defendant cannot show either deficient performance or prejudice; both of which are required for a claim of ineffective assistance of counsel.

To demonstrate ineffective assistance of counsel, a defendant must show: (1) that his counsel's performance was deficient, defined as falling

below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant, i.e., there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). Courts engage in a strong presumption that counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995); *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). Furthermore, if defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot constitute ineffective assistance. *Strickland*, 466 U.S. at 687; *State v. Mak*, 105 Wn.2d 692, 731, 718 P.2d 407 (1986).

More specifically, where the defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. *State v. McFarland*, 127 Wn.2d 322, 336-37, 899 P.2d 1251 (1995); *State v. Hendrickson*, 129 Wn.2d 61, 77–80, 917 P.2d 563 (1996); *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998).

The Defendant's claim in the present case must fail for several reasons. First, the Defendant cannot show an absence of legitimate strategic or tactical reasons that would explain why his counsel did not object to the admission of the statements at issue. As the Defendant states in his brief, A.B.R.'s credibility was "key to this case." App.'s Br. at 19. In addition, there were a number of inconsistencies in the various accounts A.B.R. gave of the events of that night. App.'s Br. at 15-16. In fact, the inconsistencies were so numerous that a catalogue of the inconsistencies stretches from pages 16 though page 19 of the Defendant's brief. The fact that there were inconsistencies in A.B.R.'s various accounts of the rape demonstrates that trial counsel may have chosen not to object at trial as a legitimate trial strategy in order to demonstrate those inconsistencies and thereby give the jury a reason to question A.B.R.'s credibility. Trial counsel, in fact, pointed some of these inconsistencies early on in closing argument. RP 361.[3]

[3] Specifically, at the beginning of her closing argument Defense counsel addressed these inconsistencies as follows:

> "I mean, there's some instances where she tells the detective and Deputy Gray that this happened in the front seat of the van. Whereas in her testimony and in what she told Ms. Sullivan, it appears it happened in the back or middle seat of this cab. She testifies here in court that there was attempted oral sex. She also told that to Nodie Sullivan. She did not tell that to Detective Birkenfeld. She did not tell that to Deputy Gray. In fact she was fairly clear to both of them it was simply sexual intercourse."

RP 361.

In short, trial counsel could have reasonably thought that allowing the jury to hear A.B.R.'s various accounts of the rape would actually work in the Defendant's favor since the testimony would demonstrate that A.B.R. had made several inconsistent statements (thus calling A.B.R.'s credibility into question). This fact, combined with the strong presumption that trial counsel was effective, shows that the Defendant has failed to meet his burden of showing an absence of legitimate strategic or tactical reasons supporting trial counsel's failure to object. His claim of ineffective assistance of counsel, therefore, must fail.

Secondly, the Defendant's claim of ineffective assistance must fail because he cannot show that an objection would have been sustained, even if his trial counsel had objected below. Rather, the record demonstrates that the trial court could have denied any objection since the statements at issue would have been admissible as excited utterances.

In the present case the Defendant acknowledges that the record shows that the victim was upset at the time when she made the statements at issue, but the Defendant claims that it is unclear exactly how much time had passed between the incident and the statements. App.'s Br. at 20-21. Thus, the Defendant claims that the record doesn't show that the victim was still under the influence of the assault at the time she made the statements. App.'s Br. at 21. This claim, however, must fail because the record shows that statements

at issue were made a short time after the rape while the victim was still under the stress of that event at the time the statements were made.

ER 803(a)(2) provides an exception to the hearsay rule for "[a] statement relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition." Thus, there are three requirements: (1) a startling event or condition occurred, (2) about which a statement was made by a declarant (3) while the declarant is still under the stress or excitement caused by the event. *State v. Thomas*, 150 Wn.2d 821, 853, 83 P.3d 970 (2004). Washington courts have often held (even in cases involving sexual assaults) that statements made even hours after the assault can still qualify as excited utterances. *See, e.g., State v. Strauss*, 119 Wn.2d 401, 416, 832 P.2d 78 (1992) (where the statements of a child who had been raped, made three and a half hours after the rape, were admissible as excited utterances as the child was plainly distressed); *State v. Thomas*, 46 Wn.App. 280, 284, 730 P.2d 117 (1986) (not abuse of discretion to admit statement as excited utterance where statement made six to seven hours after event); *State v. Flett*, 40 Wn.App. 277, 287, 699 P.2d 774 (1985) (where a statement made seven hours after a rape was admissible due to a finding of "continuing stress" between the rape and the statement); *Thomas*, 150 Wn.2d at 855 (no error in admitting statement made one and half hours after crime where victim was "scared" and "frightened" when he made the

statement and appeared to be physically shaken by the incident).

In the present case the victim made statements to her mother-in-law, husband, and Detective Gray, and all of these statements were made very shortly after the rape. *See* RP 13, 219. In addition, the record shows that A.B.R. was still visibly distraught at the time of these statements.[4] In addition, the record further demonstrates that A.B.R. was still under the stress of the rape when she was at the hospital approximately four hours after the rape. *See* RP 181-82. Specifically, A.B.R. was seen trembling and crying and was described as being "very emotional," "distraught," and "tearful and a little shaky." RP 114-15, 123, 133, 182. Furthermore, A.B.R. had brought a comforter to the hospital with her and she clutched the comforter around her very tightly while she sat forward in a "hunched position." RP 114-15.

Given these facts the Defendant cannot show that A.B.R.'s statements would not have qualified as excited utterances. Rather the record demonstrates that the statements at issue were either made very shortly after the rape or, in the case of the statements made at the hospital, within approximately four hours of the rape. In addition the record demonstrates that A.B.R. was still under the stress of the event even when the later

[4] For instance, at the time the victim made the statements at issue she was described as: "absolutely" appearing to be being under the distress or distress of a recent event (RP 35-36); being "incredibly distraught" (RP 35); "very upset, crying" (RP 16); "sobbing" (RP 35); "hysterical and crying" (RP 218-19); and "hysterical and screaming" (RP 236).

statements were made at the hospital. Thus, even if defense counsel had objected to the admission of A.B.R.'s statements the trial court very well could have admitted the statements as excited utterances pursuant to ER 803(a)(2). In short, the Defendant has failed to meet his burden of showing that that an objection to the evidence would likely have been sustained, and the Defendant's claim of ineffective assistance of counsel, therefore, must fail.

B. THE DEFENDANT'S CLAIM OF INSUFFICIENT EVIDENCE MUST FAIL BECAUSE, VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, A RATIONAL TRIER OF FACT COULD HAVE FOUND THAT THE STATE PROVED THE ESSENTIAL ELEMENTS OF THE CHARGED OFFENSES BEYOND A REASONABLE DOUBT.

The Defendant next claims that the evidence presented below was insufficient to support the guilty verdicts. App.'s Br. at 22-25. This claim is without merit because, viewing the evidence in a light most favorable to the State, a rational trier of fact could have found that the State proved the essential elements of the crimes beyond a reasonable doubt.

Evidence is sufficient if, taken in the light most favorable to the State, it permits a rational jury to find each element of the crime beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995),

cert. denied, 518 U.S. 1026 (1996); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Moles*, 130 Wn.App. 461, 465, 123 P.3d 132 (2005), *citing State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Additionally, credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Accordingly, a reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). The relevant inquiry, therefore, is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Scoby*, 117 Wn.2d 55, 61, 810 P.2d 1358, 1362 (1991), *citing State v. Baeza*, 100 Wn.2d 487, 490, 670 P.2d 646 (1983).

Pursuant to RCW 9A.44.060 a person commit the crime of rape in the third degree when he or she engages in sexual intercourse with another person (not married to the defendant) and where the victim did not consent (as defined in RCW 9A.44.010(7)) to sexual intercourse with the perpetrator

and such lack of consent was clearly expressed by the victim's words or conduct. RCW 9A.44.060; CP 124, 127.

In the present case the evidence showed that the Defendant picked up the victim at a bar and knew that she was "tipsy." RP 206-07. The victim is very petite, while the Defendant is approximately 300 pounds. RP 197. The Defendant took the victim to a somewhat isolated location where no cars or other people around, and the victim immediately asked the Defendant, "What are we doing here?" RP 253. The Defendant then began touching the victim's leg and then took her hand and put it on his penis. RP 253-55. In response the victim tried to pull her hand away but the Defendant kept holding her hand. RP 279. The victim was understandably "nervous and scared." RP 254-55.

The Defendant then got out, went around to the victim's door and grabbed her arm and put her in the backseat of the van. RP 256-57. Again, the victim asked what they were "doing there," but the Defendant didn't respond. RP 257. Instead, the Defendant tried to remove the victim's underwear, and she again asked "What are you doing?" RP 258. The Defendant next removed the victim's underwear and tried to put his head next to her vagina, but the victim responded by pushing the victim's head away, telling him "No. Stop", and by telling him that she was having her period. RP 259-60. Undeterred, the Defendant next took out his penis,

opened the victim's legs, removed her tampon, and had sexual intercourse with her. RP 260-62. The victim also specifically testified that she never told the Defendant that she wanted to have sex with him nor did she ever make any advances to him indicating that she wanted to have sex with him. RP 268.

Viewing this evidence in a light most favorable to the State, a rational juror could have concluded that the Defendant was the sole instigator of the contact that night and that at every advance the victim questioned the Defendant regarding what he was doing. Despite this fact the Defendant did not stop, but rather continued his advances. In addition, the victim went further and explicitly told him "no" and to "stop" when he attempted to have oral sex with her. She also told him that she was having her period. From these facts a rational juror could have concluded that the sum of this evidence demonstrated that the victim clearly expressed her lack of consent by her words and conduct. Finally, when the Defendant was confronted by the deputies he initially lied about having any sexual contact with the victim and a rational jury could infer that this demonstrated a consciousness of guilt.

While it is true that the victim did not fight back or call out during the actual act of intercourse, she reasonably explained that this was due to the fact that she was scared. Given the size differential between the two, the isolated location, and the fact that her previous statements had not stopped

the Defendant's advances, a jury could have concluded that the victim acted reasonably given the circumstances and that her previous statements to the Defendants were sufficient to express her lack of consent.[5] Given all of the evidence outlined above, a rational jury could have found that the lack of consent was clearly expressed. Nothing more is required.

In conclusion, viewing all of the evidence in a light most favorable to the State, a rational trier of fact could have found the essential elements of the charged crimes beyond a reasonable doubt. The Defendant's sufficiency of the evidence claims, therefore, are without merit.[6]

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[5] The fact that the victim was visibly distraught and crying after the event further demonstrates that she was not a willing participant in the crimes as suggested by the Defendant.

[6] The Defendant also briefly argues that there was insufficient evidence regarding the charge of assault in the fourth degree. App.'s Br. at 24-25. A person commits the crime of assault in the fourth degree when he or she assaults another. RCW 9A.36.041; CP 133. An assault is an intentional touching of another person that is harmful or offensive regardless of whether any physical injury is done to the person, and a touching is offensive if the touching would offend an ordinary person who is not unduly sensitive. CP 131.

The Defendant's sole argument regarding the sufficiency of the assault charge is his claim that the testimony of the victim did not show that "the advances of Mr. Gregory were unwelcome." App.'s Br. at 24-25. The record, however, demonstrates otherwise, as the victim specifically testified that she asked the Defendant what he was doing when he pulled the cab over and that when the Defendant put her hand on his penis she tried to pull her hand away. RP 279. Viewing this evidence in a light most favorable to the State, a reasonable juror could have found that this act was an offensive touching, and thus was an assault. While the Defendant gave a different description of the events at trial, the jury was, of course, free to reject his version of events. Finally, any issues regarding a course of conduct, unit of prosecution, double jeopardy, or same criminal conduct (which would apply here as the assault charge is a misdemeanor and thus not covered by the SRA) are sentencing issues, not sufficiency issues. As the Defendant has not raised these sentencing issues on appeal, they are not before this Court.

C. THE STATE CONCEDES THAT THE JUDGMENT AND SENTENCE SHOULD BE AMENDED TO CLARIFY THAT THE TRIAL COURT DID NOT IMPOSE A SENTENCE UNDER RCW 9.94A.507.

The Defendant next claims that the trial court improperly imposed a maximum sentence under RCW 9.94A.507. App.'s Br. at 25. The State concedes that the Judgment and Sentence should be amended to clarify that the Defendant was not sentenced under RCW 9.94A.507.

The State acknowledges that RCW 9.94A.507 (which authorizes indeterminate sentences for certain sex offenses) does not apply to the charge of rape in the third degree.

Furthermore, the record shows that the trial court intended to impose a determinate sentence of 29 months in custody. RP 389. The Judgment and Sentence appropriately reflects the trial court's sentence of 29 months. CP 147 (line 19). The Judgment and Sentence also correctly notes that the community custody that was imposed was imposed pursuant to RCW 9.94A.505 and *not* pursuant to 9.94A.507. CP 148-49. In fact the provisions regarding community custody pursuant to 9.94A.507 were specifically lined out and marked "N/A." CP 149.

Under the section noting that the trial court was imposing a sentence of 29 months, however, there is a box on the Judgment and Sentence that was

filled in as follows:

CONFINEMENT UNDER RCW 9.94A.507- The Defendant is sentenced to the following term of confinement in the custody of the DOC: **COUNT I Minimum Term: ____ Months** **Maximum Term: ☐ 10 years from today's date ☒ for the remainder of Defendant's life** **COUNT___ Minimum Term: ____ Months** **Maximum Term: ☐ 10 years from today's date ☐ for the remainder of Defendant's life** **COUNT___ Minimum Term: ____ Months** **Maximum Term: ☐ 10 years from today's date ☐ for the remainder of Defendant's life** The Indeterminate Sentencing Review Board may increase the minimum term of confinement.

CP 147.

As shown above, no "minimum term" was filled in for "Count I." In any event, as the sentence for Count I (rape in the third degree) is not governed by RCW 9.94A.507, nothing in the above box applied to the present case and the box should have been left completely blank. Thus, the State agrees that the Judgment and Sentence should be amended by striking out the box above, as it does not apply to the Defendant's sentence.

IV. CONCLUSION

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed. The Judgment and Sentence, however, should be amended to clarify that the Defendant was not sentenced under RCW 9.94A.507.

DATED July 23, 2012.

Respectfully submitted,

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DOCUMENT1

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